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WINNOWINGS IN AMERICAN HISTORY.

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VIRGINIA TRACTS.

No. II.



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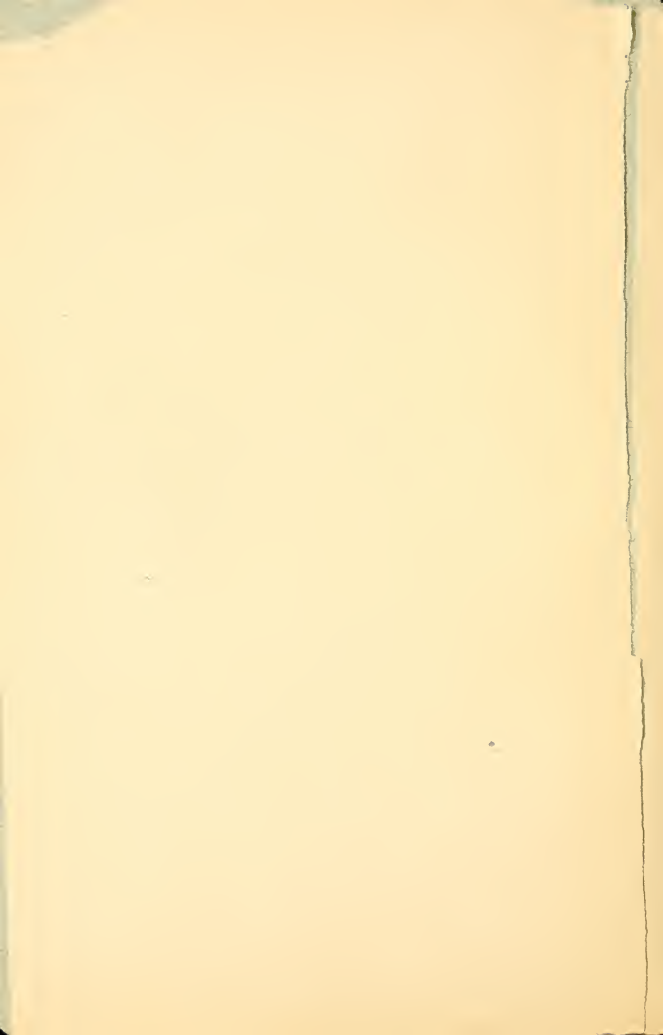
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VIRGINIA TRACTS.

No. II.

250 copies printed.

No. 67



The Controversy between  
Lieutenant-Governor  
Spotswood, and his Coun-  
cil and the House of Bur-  
gesses, on the appointment  
of Judges on Commissions  
of Oyer and Terminer.  
1718.

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EDITED BY  
WORTHINGTON CHAUNCEY FORD.

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THE address to the King, and the Orders of the House of Burgesses to its agent, are now printed for the first time from a MS. found among the Ludwell Papers. The plea of William Byrd is taken from the *Calendar of Virginia State Papers*, I., 190. The Council's representation is taken from the *Spotswood Letters*, II., 221.

Among the instructions given by the English ministers to Lieutenant Governor Spotswood was one that enjoined the appointing of courts of Oyer and Terminer at least once every half year. Such courts had only recently been provided for in the colony, as the first law on the subject had been passed in 1692;\* and was intended to provide for the more speedy prosecution of negroes and other slaves for capital offences. By this act the Governor, upon information of the offence and of the

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\* *Hening's Statutes at Large*, III., 102.

offender's imprisonment, was to issue a commission of *oyer* and *terminer* directed to such persons of the county in which the crime was committed as he shall think fit. The trial was then made without jury, and the criminal, if convicted, was to be punished according to the English law. By a second act passed seven years later, the governor could issue like commissions, directed to the admiralty judges, and "to such other substantial persons as he shall think fit to nominate and appoint," to punish piracy.\* In 1705 the law of 1692 was re-enacted so far as the issue of commissions was concerned, the intention of the statutes being to secure speedy justice without the extraordinary charges attending the process of the other courts.

When Spotswood undertook to carry out his instructions, he was met by the assertion of the Council that the matter was sufficiently provided for by the Act of 1705, establishing the General Court, by

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\* *Hening*, III., 179.



which criminals were appointed to be brought to tryal on the fourth day of the General Court, held twice a year.\* Spotswood was correct in his intention, as the authorities in England had raised objections to some of the provisions of that act. To quiet these objections a law was passed in the October session (1710) expressly disclaiming that anything in the law of 1705 should be "construed, deemed, or taken to derogate from, lessen, or abridge the roial power, prerogative, and authority of her Majesty, her heirs and successors, of granting commission or commissions of *oier and terminer*, or of constituting and erecting such other court or courts of record, as her Majesty, her heirs or successors, by her or their commission or commissions, instruction or instructions to her or their governor or commander in chief of this colony and dominion, for the time being, shall direct, order or appoint."†

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\* *Henning*, III., 293; *Spotswood Letters*, I., 8.

† *Henning*, III., 489; *Calendar of the Virginia State Papers*, I., 143, 144.

This act gave the governor all the authority he needed, and accordingly he appointed the first court to be held at Williamsburg, the second Tuesday of December, and proposed to recommend to the Assembly to make the same provision for defraying the charge of the juries and witnesses attending this court as was made for the trial of criminals at the General Court.\*

The utility of such tribunals became so evident, that the Council in 1712 did not hesitate to express their unanimous opinion that they should be held, whether there was any criminal to be tried or not. Political differences intervened and raised a more serious question as to the appointment of the judges. In December, 1712, when a man was to be tried for his life, the governor, believing that he could not count upon more than four of the council to sit, joined with them the Speaker, and "two others of the most eminent members

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\**Spotswood Letters*, I., 24.

of the House of Burgesses." The Council held that the judges should be taken only from their number, as was the case with the General Court; and, regretting their excessive liberality, also determined that commissions of *oyer and terminer* should issue only where a criminal was to be tried.\*

The differences were determined for the time by mutual concessions. The Governor agreed in future to appoint only members of the Council, and the Council adopted the Governor's opinion as to holding the courts. Yet the Governor was not convinced; and he wrote to his superiors: "I cannot give up my judgment withal upon this last point [appointment of judges] unless I find your Lordships concur with these gentlemen in their sentiments, which are, that since the Gen'l Court has hitherto been the only stated Court of Judicature in this colony, which hath had cognizance of life and

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\* *Spotswood Letters*, II., 25.

Member, the Council, who are constituted the Judges thereof, look upon that same jurisdiction to be confined to them, and cannot submit to share it with other persons ; that some Governors might make a very dangerous use of this precedent, and bring thereby men's Lives and libertys under less security than their Estates ; that the Gentlemen of England are never added to the Judges in Commissions of Oyer and Terminer, but in their Circuits ; and that it is done, because in those progresses there is but one Judge to sit on the Pleas of the Crown ; and lastly, that such affairs should proceed in the usual method, except where unusual accidents shall require an extraordinary exertion of the royal Power. This, my Lords, is faithfully the sum of their Arguments, and if it shall be judged that there is no need of a Governor's giving now and then an instance to undeceive people here, and manifest the Prerogative of the Crown, and particularly in this point to convince

some that the General Court Law passed here in 1705 has not established the Council to be the only Judges of Life and Death that her Majesty may appoint ; or if after all, your Lordships shall determine that the Members of the Council, and no others, ought to be the Commissioners of those Courts of Oyer and Terminer, which her Majesty orders me to constitute, I shall then most willingly continue to appoint them solely, according as I have already promised them, shall, for the future, be done, till I am otherwise commanded.”\*

In raising the question of prerogative, the Governor touched an extremely sensitive point of the administration, and one that was sure to respond on the side of the royal representative. Although Spotswood had submitted his case in June, 1713, and sent over the Council's representation (printed *post*), it does not appear to have been decided in England

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\* *Spotswood Letters*, II., 26.

till June, 1716, when the full weight of authority was given to the governor's position.

He was told that he had power to appoint a particular court of Oyer and Terminer, and constitute the Judges thereof, unless it be otherwise directed by Act of Assembly. This opinion was fully supported by the law of 1710, already cited.

An opportunity to test his strength soon occurred, and to "remove that wrong notion, which has been carefully infused into the people here, that his Majesty has not the same power of constituting Judges here as in England, I thought it necessary to appoint five of the Council and four other of the principal Gentlemen of the Country to be the Judges, but some of the former resolving still to adhere to their former opinion that ye Council ought to be ye sole judges in all criminal matters, refused to sitt, tho' it might have been expected they would have acquiesced in

your Lordships determination of that matter, since they have little to plead for themselves, but what your Lordships have had already under consideration, and that his Majesty's Attorney General and all ye other eminent Lawyers here are clearly of opinion that there is not authority, either in the Laws of the Colony or in the Charter of King Charles the II., that favors their pretensions. I should not have troubled your Lordships upon this head, (seeing the Council have made nore presentation to me as they did before), but that it [has] become a practice of late to hand Secret Remonstrances of the affairs of Government, without any [my?] knowledge to private Agents, to be of use for concealed Designs, and I am apprehensive some such may be made on this occasion, and, therefore, I was willing to give your Lordships some intimation of this Dispute that you may not be surprised into any alteration of what you have already declared to [be] your sentiments thereof,

nor made to believe that while I am contending for the legal Rights of the Crown I'm lessening the just privileges of the Council. For, whatever specious Arguments they may use, it is certain their pretensions are now as frivolous ; the Constitution of England, the laws of this Country, and ye Constant practice of former Causes ( ? ), are entirely against them, and I hope your Lordships will give no Countenance to any thing that shall be urged in their behalf till I have an opportunity of setting forth what may be justly offered in support of his Majesty's prerogative, and of the power his Majesty has been pleased to grant to his Governor for the Nomination of such Judges, which is now called in question."\*

The question once opened, it was not long before Spotswood began to urge improper motives on the part of the Council, and explained their attitude by their desire to abuse the generosity of the King, and to

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\* *Spotswood Letters*, II., 259, 260.



share in the public revenue. Councillors were formerly willing to sit with common Justices of the Peace in commissions, and never raised a doubt on the legality or propriety. But when a salary of £100 was attached to each court, they claimed the sole power of judicature, and advanced the pretension of being the sole judges of those courts on their birth. Why, asked Spotswood, would not a repeal of this grant be the simplest solution of the problem?\*

The friction between the Governor and the Council increased, and as the Burgesses supported the Council, the latter body came in for a share of his suspicion and displeasure. In 1710, when the path of the Governor was by no means an easy one to tread, he had sharply criticised the Burgesses, from whom he had at first received approval of his conduct: "That unhappy humor of the Country in choosing for their Representatives, persons of mean

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\* *Spotswood Letters*, II., 270; March, 1718.

understandings." "I cannot yet see what will be the temper of this Assembly, the inclinations of the country being rendered more mysterious by a new and unaccountable humor which had obtained in several counties of excluding the Gentlemen from being Burgesses, and choosing only persons of mean figure and character." "Such people being rarely possessed with a publick spirit, and generally bringing along with them the same pernicious temper in their public transactions that governs them in their private capacities."\*

It was, however, against the Assembly that began its first session in April, 1718, that he levelled his severest criticisms. The same leaven or humor was at work, and during the elections every attempt was made to inspire the people with a dread of the enormous expenditures to be made if they supported the Governor.

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\**Spotswood Papers*, I., 19, 132. *To the Board of Trade*, 24 October, 1710, and 28 December, 1711.

They would be ruined by the executive's extravagance, and no one should receive their suffrage who had an affection for the Governor. "To encrease the disaffection toward the friends of y<sup>e</sup> Government, great care was also taken to possess the people with a partial account of the late Dispute about the Courts of Oyer and Terminer, to represent to them that great Infraction of their Charter, and the dangerous Consequences of allowing the Governor a power of nominating Judges to try men for their Lives; a Paper was drawn up in the nature of a Grievance against these Courts, and sent all over the Country to be signed by the People, and in order to make this go down the better, some other popular Propositions were coupled with it, such as the ascertaining officers' fees by Law—this being what every one desired to see regulated. But this Train would not take, the people generally refusing to concern themselves therein, and choosing rather to drop the

Article of y<sup>e</sup> officers' fees than sign to that which they knew to be only calculated to enlarge the power of a party in the Council. So that the Grievance of the Oyer and Terminer Judges came only recommended from two Countys, and was signed in one but by 18 and in the other by no more than 11, and all very obscure fellows."

The result of these election manœuvres was to return a House in which a majority was opposed to the Governor, and one that soon began to show its opposition. The "first remarkable step the Assembly proceeded in," was to prepare the address to the King that is printed in the following pages. "To solicit this address, they thought fitt to have a particular agent, and to this purpose prepared a Bill whereby the Burgesses were of themselves impowered to name, (barely by a Resolve of their House,) any person to be their agent; by the like Resolve, change him and put in another, and by the same

power to pay such agents what sums they thought fitt, without any concurrence of the Governor or Council. This power, tho' strenuously contended for by such of the Council who sett the Burgesses to work, was, nevertheless, so ill relished by the soberer men of the same party, and so exclaimed against by the other Gentlemen of the Council who are not in their Interest, that it was at last thrown out in the Council, and soon after a Vote passed in ye Burgesses House appointing Mr. Byrd their agent, and assuring him of a suitable gratification for his trouble, and a select Committee appointed to prepare Instructions for him, a copy of which as they passed the House, I here send. By which your Lordships will perceive what mighty occasion they have for throwing away the Country's money upon such an agent, when they have so little Business for him to regulate, and when they were told that the transmitting addresses to the sovereign by any other manner than through

the hands of the Governor had been disapproved of by the late Queen, upon a [report?] from the Lordships Board in a case wherein the very Gentleman was employed as [agent] in 1702. But the truth is, the main aim of constituting an agent was disappointed by the Miscarriages of their Bill, which would have enabled that party, (if they were so weak as to imagine I would pass it,) to dispose of every farthing of the publick Money at their pleasure and to their Friends, for by the same power of making and gratifying agents by the Resolve of their House, they might, from time to time, have nominated one another, and given what sums they thought fitt for no services at all. That this is no unreasonable conjecture, will appear from another step taken after their Agents' Bill miscarried. A Bill was prepared by the Burgesses and sent up to ye council and passed there, whereby £4000 of the publick money was ordered to be put into the hands of Mr. Arch'd Blair, under pretence

of intrusting him to put it out at Interest for 4 per cent. per annum, of which he was to be allowed one-half for his trouble ; but with this express Condition, that if he did not lend it, he should pay no interest at all. This Gentleman, now a member of the House of Burgesses, is brother to Mr. Com'ry Blair,\* one of the Council, and they are in Partnership with Colo. Ludwell,† and are concerned in one of the most considerable Trading Stores in this country. And as this money, being once placed in his hands by Act of Assembly, could not have been called out of his hands but by the same authority, and as there is in the Council a great majority of the Relations of those Gentlemen, should they have refused their Concurrence to the recalling that Money, it must remain in his hands without any interest to the country as long as they pleased. And for

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\* James Blair.

† Philip Ludwell.

this Reason I have resolved to reject that Bill.\*

All this trouble Spotswood laid at the door of the eight councillors who had signed a remonstrance against the Courts of Oyer and Terminer.† “A Governor cannot contrive a surer way of gaining their disfavor than by strictly pursuing his Duty and faithfully discharging his Trust. Your Lordships’ Determination about the Disputes of the Courts of Oyer and Terminer remains deeply rooted in their minds, and they have publicly declared at the Council •Board that though they could not help acquiescing therein, they were not convinced of the Legality of that Decision.” And he urges that the members of the Council be changed, that his Majesty’s authority may be settled upon a solid Basis. Political differences led to social separation, and the recalcitrant

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\**Spotswood Letters*, II., 277, 278. *To Board of Trade*, 24 June, 1718.

† Only seven councillors signed.



Councillors celebrated by themselves, not attending the entertainments given by the Lieutenant-Governor, nor inviting him to their own. Fortunately this strained situation was relieved by the recall of Spotswood ; but it is doubtful if Virginia ever had a Governor who had the interests of the Colony more at heart. The same difficulty hampered him as weighed upon the endeavors of every loyal representative who wished to advance the welfare of his charge. It was impossible to reconcile the demands of prerogative with the expanding energies of a State essentially democratic.

The composition and functions of the Council were sufficient to invite the opposition of Governor and even of people, for they were somewhat anomalous. The members were appointed in England upon the nomination and recommendation of the Governor. Naturally he would seek to give support to his master's authority by selecting the ablest men ; but his own

power and influence were not to be neglected. By nominating such as were rich, politically influential, and of wide and powerful connections, he could not only gain their favor and voice, but add to their importance as well. The position of councillor served as well to conciliate an enemy as to strengthen a friend, and it was not infrequently used as a bribe, and frequently as a favor. Considering the temptation thus offered, it is as remarkable as it is creditable, to find so many able, honest and patriotic councillors, and so few of the self seeking and unscrupulous element. This Council gave advice to the governor on public measures, and in this function it acted as a branch of the executive. Members of the Council were collectors, naval officers, secretary of the colony, auditors and farmers of the revenue. The Council was also the Upper House of the Assembly, taking its share in legislation, and quite as important a share as the Burgesses exercised. Its members were the

Judges of the General Court, the highest court in the colony. Was not this an extremely centralized power? As legislators, they framed and passed measures; as judges, they interpreted them; and as councillors they assisted in their execution. Their social position gave them a great influence with the people and the Burgesses, and their official standing magnified this influence. Was it strange that a Governor should have a wholesome fear of such a body, if he were so unfortunate as to invite its opposition? Spotswood asserted that his immediate predecessors had been recalled through the intrigues of the Council; and to save his own head, he sought to oust the Council, that another, friendly to himself, might be appointed in its stead.

Some of the members of the Governor's Council drew very refined distinctions in defence of their apparent inconsistency, holding that they might as councillors reject or deem unfit a measure which in the

capacity of legislator they might support. And this, too, when their right to vote in the Upper House rested entirely upon their being sworn in as Councillors. In the Council they were bound by oath to assist the Governor, and to defend all jurisdictions and authorities appertaining to his Majesty; in the Assembly they would naturally be on the side of the people, and regard only what was for the good of the colony. But sometimes the two positions would differ radically, and the Governor with chagrin saw the measures which he had prepared with the assistance and advice of his Council opposed and rejected by this same Council when sitting in assembly. More than that, some held that, as councillors, they were not expected to express an opinion on the legality of an act, for the same question might come before them as judges, and it would be awkward to have previously given their decision. If the Governor was to receive no assistance from

the Council, wrote Spotswood, "I must confess I don't see of what use they are to the service of the Crown, since, in the passing of Laws they are not bound to consider his Majesty's interest nor in the execution of 'em to give their orders, and that on all unpopular occasions, a governor may not expect the assistance of his Council, but he may assuredly depend on all the blame."

It must be admitted that in the controversy over the Oyer and Terminer commissions, either side had a fair argument to support its claims. Spotswood was too greatly impressed by a fear of an oligarchy, and saw with distrust the extensive interest centered in the hands of a few families. He was bound also to protect the rights of the Crown, and especially to guard that very elastic and sensitive attribute of royalty—prerogative. In performing what he regarded his duty he naturally found it difficult to maintain a consistent policy. To break down the in-

fluence of the aristocracy, he needed democratic instruments ; and to defend prerogative, he must be on the side of absolute power, controlled as little as possible by popular measures. He alienated his Council, and he antagonized the Burgesses ; yet his policy was, on the whole, in favor of the people. But a distrust or jealousy prevented him from carrying out his plans. The appointment of the Judges was but one point of antagonism. He was denied the privilege of appointing the clerks of the County Courts, on the ground that as these clerks were frequently elected Burgesses, the influence of the Governor in that House might become too strong, for these would hold their clerkships at his pleasure. The alternative scheme, whereby these clerks would hold their office at the hands of the Justices, offered quite as serious an objection, as these Justices were the members of the Governor's Council, and constituted the Upper House of Assembly. It was merely a choice of masters.

On the other hand, there was danger that the commissions to hold such courts, coupled with a power of nominating the Judges, might be so employed as to become an engine of tyranny. The murders, committed under the form of law, but none the less murders, perpetrated after Bacon's rebellion in Virginia, and after Leisler's administration in New York, were still fresh in the minds of the people, and furnished terrible examples of the abuse of power, of the travesty of justice, in the hands of an unscrupulous executive.

Byrd went over to England about 1716, where he pleaded the cause of Philip Ludwell in his controversy with Governor Spotswood. He was then Receiver General of his Majesty's revenue in Virginia, and it was in part official questions that led to his journey, which from one cause and another was so prolonged, that Byrd must have suspected Spotswood would seek to oust him from the Council. In

September, 1718, Spotswood did write, saying: "Mr. Byrd, one of the Council here, having been gone from hence three years and a half, and seeming, by his Letters and the new Employm't he has got into of being constituted Agent for the House of Bing's, to incline to a much longer continuance in England I hope Y'r Lo'ps will thinke fitt to move his Maj'ty to appoint another Counsellor in his room"\* —and he recommended Mr. Cole Digges. Byrd soon heard of the attempted change, but understood that Peter Beverly, for several years Speaker of the Burgesses and County Treasurer, was the gentleman nominated as his successor. And he pleaded his cause so well before the Lords Commissioners of Trade, that he obtained an order of Council restoring him to the Council and his former rank therein.† Armed with this he sailed at an early

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\* *Spotswood Letters*, II., 304.

† Calendar of the Virginia State Papers, I., 195.



day for Virginia, and took his place in the Council.

WORTHINGTON CHAUNCEY FORD.

*Brooklyn, N. Y., April, 1891.*



*The Council's Representation to the  
Governor touching Commissions of  
Oyer and Terminer.* Received May  
y<sup>e</sup> 1st, 1713.

MAY IT PLEASE YOUR HONOR:

As the constant civilitys your Honor  
has on all occasions exprest to the  
Council raised in us a suitable degree  
of gratitude, so the Experience we  
have of your Justice and Moderation  
makes us hope you will not be dis-  
pleased with this, our Just and neces-  
sary Representation. It was not with-  
out some uneasiness to us that were  
present to find in the Last Commis-  
sion of Oyer and Terminer some other  
persons joyned with the Council. But  
in regard no criminal was then to be  
tried, and because we were unwilling  
to show a publique disapprobation of

what you had then been pleased to determine, we thought it most respectful to your Honor not to absent ourselves. However, we must now beg leave in a more decent, and, we hope, in a more agreeable manner, to make our Exceptions to such Commission, and we hope you will not think it altogether without reason. When your honor was pleased to cause her Majesty's Instructions to be read in Council relating to this matter, and after some debates had arisen about it, you were pleased to declare, (if those that were present remember rightly,) that you had no intention to appoint any other persons but the Council in that Commission; and if it should be otherwise, we beseech your Honor to reflect how much the General Court will be divested of its Jurisdiction, which is not only founded on the late Law, but also upon the constant usage

of this Dominion, no Instance being upon Record that any other stated Court of Judicature hath had cognizance of Life and member but the General Court only, and, with humble submission, there is great reason that it should be so; for it would be hard that men's lives should be try'd by more Inferior Judges than their Fortunes, of which the last Resort in this Country is in the General Court. Tho' we have the most entire confidence in your Honor's Justice, and do firmly believe that in all things you will act according to the nicest Rules of Integrity and honor, yet in times to come it may be our misfortune, in your stead, to have a Governor who may make a very dangerous use of this Precedent. In such a Case we submit it to your Honor's penetration how much less security men's Lives and Libertys will be under than their

Estates, whenever it shall please God, for the punishment of this Country, to put it under the direction of a passionate and resenting Governor. It is possible some may object that in England other Gentlemen are frequently added to the Commissions in Oyer and Terminer in their Circuits thro' the severall Countys, and also that in this Country some Commissions of this kind have been issued for Tryal of the Pirates and Indians in Extraordinary cases. To both these objections we beg leave to answer as follows:

We own the Judges in England do carry with them in their Circuits Commissions of Oyer and Terminer, wherein some Gentlemen of the respective Countys are named Associates with them. But this is purely for the ease of the Country, that Prisoners may be tryed without the Trouble of sending them up to the King's Bench. In the

Circuits there is but one Judge to sit on the Pleas of the Crown, and therefore it may be thought necessary to join some other Persons in Commission with him. But there is no Instance of such an addition to the Judges when they set upon Life and Death in the King's Bench.

Those Commissions which have issued in Virginia were sent out for the Tryal of very uncommon and enormous Crimes, but we humbly presume that such Extraordinary Courts can't, with much reason, be compared to a settled Court that hath its constant Returns twice every year, that holds its Sessions in the Metropolis of the Colony and in the very seat of the General Court, and hath cognizance of all breaches of the Peace, as well as of Pleas that concern life and member.

Since it hath been insinuated to your honor that the Council, in advis-

ing the Continuance of this Court, had too much regard for the allowance for that purpose, we humbly beg leave to repeat the same Explanation of our meaning, that some of us made use of at the time it was debated, to-wit, That if we were obliged to leave our affairs at home and come to attend this Court, we had a fair claime to the Salary; but if your Honor would please to despatch a timely notice to us that no Criminals are to be tryed, that then, being put to no trouble, we should not expect any pay. Upon the whole matter, we entreat your Honor to observe, that when we were appointed members of the Council, we found this Jurisdiction confined only to the Judges of the General Court, and we should be unwilling that our successors should reproach us with having willingly departed from it; however we don't presume to measure the pre-



rogative of the Crown in such matters, but humbly hope that her Majesty will be graciously pleased to suffer such affairs to proceed in the usual Method, except where unusual accidents shall require an extraordinary Exertion of her royal power. However, if your honor shall see cause to be of a different opinion, and shall still be pleased in these Courts to joyn other persons with the Council, we humbly beg you will have the goodness to dispence with our attendance on such occasions for the future, and shall think ourselves very unfortunate in having Sentiments in this only business opposite to your Honor's, being with all the duty and respect in the world, Your Honor's most faithfull and Most humble servants,

JNO. CUSTIS,	ROBERT CARTER,
JOHN LEWIS,	PHILL. LUDWELL,
W. BYRD,	HEN. DUKE,
	JOHN SMITH.



TO THE KINGS MOST EXCEL-  
LENT MAJESTY.

THE HUMBLE ADDRESS OF THE HOUSE  
OF BURGESSES OF VIRGINIA.

*Most Gracious Sovereign :*

WE your Majestys most dutifull  
and Loyall subjects the Burgesses of  
this your Ancient Colony and Domin-  
ion of Virginia now Assembled do  
heartily embrace this first opportunity  
humbly to congratulate [your] Sacred  
Majesty on the Success of your Arms  
against those Dangerous Re[bels] who  
blinded with party fury made such  
desperate Efforts, for the Subversion  
of your Religion and Libertys and  
Likewise to return our unfeigned  
thanks for your great care of the  
Trade of our Mother Country, of  
which we (tho' very remote) feell the

happy Influences, and do Firmly believe the present flourishing condition of this Country is next to the Divine goodness owing to the Wisdom of your Majestys Councells and glorious Administration.

Your great goodness displayed in the tender regard you shew for all your Subjects, gives us boldness at this time to approach your sacred person and most humbly to represent, That the Hon<sup>ble</sup> Alexander Spotswood your Majestys Lieutenant Governor pursuant to your Royall Comands hath laid before this house your order in Council bearing date at Hampton Court the 31 of July 1717, and also your Royall Instruction dated the 27 of September last upon consideration of which we are humbly of opinion That by the said Instruction your Majestys Subjects may be depriv'd of the best means of raising a revenue

for the Support of this your great and most Ancient Colony, let the Emergency be never so great, till your royal pleasure is known therein, Which through our Naturall Scituation we conceive may prove of dangerous Consequence to the Future Safety of all your good [sub]jects residing here—.

Wherefore we most Humbly Implore your Majesty that you will be graciously pleased to allow us the Liberty of making Laws, for the good and support of this Colony as formerly it being often needfull that Laws should take place immediately, and as the Dependance we have on Trade will always make us cautious of Laying unnecessary burthens upon it, so the Negative with which your Government is vested may alwayes be an Effectuall Barr thereto—.

We further begg leave to represent to your Majesty that the Judges of

your General Courts have from the first Settlement of this Colony had Congnizance of all Criminal cases, which Jurisdiction was granted to them by the Letters Pattents of your Majestys Royall predecessors and confirmed to them by Act of Assembly, And whereas her late Majesty Queen Anne was pleased by her Royall Instruction to appoint two Courts of Oyer and Terminer to be held in this Colony every Year with the gracious view that all persons Accused of any Crime might be brought to a speedy Tryall, The Hon<sup>ble</sup> the Lieut. Governor pursuant to the said Instruction is Impowered to appoint in the said Courts what Judges he pleases exclusive of the constant Judges above mentioned, Nor doth he hold himself obliged so much as to take the advice of his Council in the Nomination of the said Judges whereby we appre-

hend the Governor may have the Lives and Estates of your Majestys good Subjects of this Colony very much in his power and will be able to defeat the Jurisdiction of your Majestys said Generall Court whenever he shall think fitt—

Therefore we most Earnestly pray that your Majesty out of your great goodness will direct by your royall Instruction to your Governor that the Judges of your Generall Court (who being appointed by your Majesty out of the ablest and Discreetest of your Subjects in this Colony and holding their places during your Royall pleasure, have alwayes with great Honour and Justice and to the General Satisfaction of your people discharged that great Trust) may be declared the only Justices of the said Courts of Oyer and Terminer, or that your Majesty will be pleased to restrain this dan-

gerous power, in such other manner as you in your great Wisdom shall think most proper.

To you Great Sir we fly for Succour and Support, our Safety is bound up in yours. Whilst you sit secure on the Throne of your Ancestors [the op]-pressed can never want a powerfull and ready Defender and therefore for our own and Countrys sake, we must never cease to Implore the divine protection over you, That the almighty would Effectually give you the hearts of all your Subjects, and defeat the Designes of your Enemyes and continew the Crown in your Truly protestant Family to all Posterity.

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Mr. Corbin \* reported that a Duplicate of the Address to the King had

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\* Col. Gawin Corbin, of King and Queen county.



been examined and that the same was fairly Transcribed.

Ordered

. That the Duplicate of the said Address be signed by the Speaker.\*

Resolved

That it is of absolute Necessity that an Agent be appointed to Solicit the Affairs of this Colony in Great Brittain and particularly to present the Address of this House to his Majesty.

Resolved

That Will<sup>m</sup> Byrd Esq<sup>r</sup>. be and is hereby appointed Agent for this Colony and that he be desired by the Speaker to take upon him to Execute the said office pursuant to the Resolves of this House.

Resolved

That the said Agent shall be allowed out of the Publick Treasury of

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\* Daniel McCarty, of Westmoreland.

this Colony full Satisfaction for all his Disbursem<sup>ts</sup> and Trouble in Negotiating the Address to his Majesty and other Affairs of this Colony. •

Ordered

That the Clark of this House prepare two Copys of the Journalls of this Session so soon as may be conveniently done and Deliver the same to the Speaker.

Ordered

That Mr. Corbin, Mr. Harrison,\* Mr. Grymes,† • Mr. Blair,‡ Mr. Conway and Mr. Ethridge prepare Instructions to the said Agent and report the same to the House and that Mr. Cary attend them as Clerk.

Resolved

That tis the desire of this House

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\* Benjamin, the son of Benjamin Harrison, of Surry, and father of the Signer.

† John Grymes.

‡ Archibald Blair.

that Mr. Speaker Transmit to the said Agent the two Copys of the Journalls aforesaid, the Duplicates of the Address to the King, together with such Instructions as shall be agreed to by this house.

*Endorsed:* B<sup>s</sup>. Address to y<sup>e</sup>. K. and some orders, May, 1718, about theyre Agent.



*Remonstrance of William Byrd to the  
Lords Commissioners of Trade and  
Plantations.*

MY LORDS,

THE great diligence which your Lord'ps employ to rectify whatever you find amiss in the Plantations, encourages me to lay before you an unhappy difference betwixt the Governor and the Council of Virginia, on occasion of his haveing joined several Persons with the Council in a Commission of Oyer & Terminer, which I humbly conceive he could not regularly do, for the following Reasons:—

1. The laws of that Colony, and particularly the 24th in the Printed Book, have most expressly limited the Tryals of life and Limb to the General Court, and 'til laws shall be

repeal'd either by subsequent acts, or by His Majesty's Proclamation, I humbly conceive they are binding against all Governors whatever.

2. King Charles the 2nd by His Roial Charter, bearing date the 10th day of October 1676, was graciously pleas'd to grant, amongst other Priviledges to that Colony, that the Governour and Council for the time being should have full power and Authority to hear and determine (the very English of Oyer and Terminer) all Treasons, Murthers, Felonys, &c., to be Committed within that Government. Now if they were to hear or determine all Pleas of the Crown, there can be no room for the Lieutenant-Governour to Constitute any other Judges of Oyer and Terminer for that purpose.

3. All Criminal Cases, have by the constant usage of that Colony ever since its first Settlement, been heard

and determined by the Governour and Council for the time being. A custome therefore establisht by so long practice, and to which no manner of Inconvenience has ever been objected, ought not in reason or justice to be overturned, to gratify the humour, or perhaps the passions of any Governour.

4. The Custome Confineing all Tryals in Criminal Cases to the Governour and Council, hath been founded on reason and Justice, because as nobody must doubt of the Governours being well qualifyed, so likewise the Council is by His Majesty's express Instruction, to be appointed out of the Gentlemen of the greatest abilitys and best Estates in the Country, who are certainly most capable, and most likely to do impartial justice betwixt His Majesty, and all His Subjects. Besides the Council are always ap-

pointed by the King himself, whereas the persons join'd to them in these Commissions of Oyer and Terminer, are only nam'd by the Lieut. Governour, without the advice of any body, for a particular time and (it may easily happen) for a particular purpose.

5. To the foregoing Reasons, may be added the very fatal inconvenience that may follow upon the putting it into the Sole power of a Governour, to try any person by what Judges he may think most proper: who ever has had the fortune to live in the Plantations, has abundant reason to know, that Governours are not in the least exempt from humane frailtys, Such as a passionate love for money, Resentment against such as presume to oppose their designs, partiality to their Creatures and Favorites, and many other Passions, to which men in power are more Subject than other people.



Now supposeing this to be true, I most humbly submit it to your Lord-s'ps, whether a Governour will not have it too much in his power, either to condemn the Innocent, or acquit the guilty, if he have the sole authority of appointing his Judges: or whether it be reasonable, that a Governour, who by a most express Instruction, can't appoint so much as a Justice of the peace, to decide the smallest property, without the advice of the Council, Should yet take upon him, by his own absolute will and pleasure, without any advice in the world, to appoint Judges, who without appeal are to determine not only concerning the Lives and Libertys, but also concerning the whole Estates of all those unhappy persons who shall be brought before them.

6. Another great Inconvenience is the bad Understanding, this Innova-

tion must needs create betwixt the Governour and Council for his endeavoring to take from them a Jurisdiction which they have held from the first Settlement of that Colony, not to mention the unhappy Disquiet it must needs beget in the minds of His Majestys subjects there, when they find their lives and fortunes left so entirely at the mercy of this Lieut.-Governor, and of all the Governours that may hereafter be appointed to succeed him. Tis possible, my Lords, that 2 objections may be rais'd to justify this extraordinary proceeding of the Lieut.-Governour, which I beg leave to lay before your Lord'ps, and to answer in the following manner:—

Obj. 1st.—That the Governour of Virginia is by His Majesty's Commission, authorized to appoint Courts of Oyer and Terminer for the Tryal of Criminals.

Ans. The Council of Virginia are very far from presumeing to dispute His Majesty's Prerogative of erecting what Courts he pleases in His Colonys and Plantations. They only intreat your Lord'ps to observe, that altho' the Governour's Commission doth authorize him to appoint Courts of Oyer and Terminer, yet it doth not empower him to Constitute such Judges in those Courts, as are excluded by the Roil Charter, as well as by the laws and constant practice of that Colony: it is a known maxim in law, that all grants and Commissions issued by the King must ever be constant in such a manner, as to make them consist with law and justice. Such a construction as this, the Commission to the Governor of Virginia may naturally receive, for the Governour may doubtless appoint Courts of Oyer and Terminer and

name the Judges of those Courts out of the Council, (which ought to consist of twelve of the best qualified Gentlemen of that Country,) from amongst whom he may appoint a competent number, without transgressing any law, or incurring any inconvenience whatever, by which means, both His Majesty's Commission on the one hand, and the Royal Charter, as well as the laws of the Colony, on the other, will remain in their full force and virtue.

Obj. 2nd.—Just after Bacon's Rebellion, there was a Commission of Oyer and Terminer, wherein Sir John Berry, Colo. Jeffreys, and Colo. Morrison were join'd to the Council, and since that there have been other Commissions issued, wherein the respective Governours have nam'd other persons for Judges, besides the Council, for the Tryal of Pyrates and Indians.

Ans. As to the first of these Commissions, it was issued just after a Rebellion wherein severall of the Council were suspected to be involved, which I thank God, is now very far from being the case, all the Councill being as firm to the Interest of His Majesty, as any the most loyal of His Subjects. There was in that case, a necessity of chooseing other Judges; which might justify the stepping out of the common road for that time; but it can never be drawn into Precedent to countenance the doing it in ordinary cases. And then, My Lords, as to the few Instances of Commissions granted for the tryal of Pyrates and Indians, your Lords'ps will easily discern, that neither of these Kind of Criminals could with any propriety be accounted Inhabitants of that Colony, and consequently were not entitled to the benefit of the Roial Charter, which

was granted in express terms only to His Majesty's Subjects, Inhabitants within the Colony of Virginia. But whether even these Courts of Oyer and Terminer were consistent with the laws of that Country, I must submit to your Lords'ps. If they were not, 'tis certain that the violation of any law in times past, can't excuse the Transgressing of it now. But supposing the best, that these Commissions were not contrary to law; yet such extraordinary cases can never be set up as Precedent to justify the joining other persons with the Council in a Regular Court, that by His Majestys Instructions, is to have its returns twice every year, and which taketh cognizance of Breaches of the Peace, as well as of pleas that concern life and member.

Upon the whole matter, in regard that this step of the Licut.-Governour

has been made, contrary to the Express terms of the Royal Charter, in violation of the laws of that Colony, and against a constant usage, founded on reason and justice, and since such fatal Inconveniences may attend the Governour's being invested with so absolute power, from which no advantage can accrue to His Majesty's, I make no doubt, but your Lords'ps will please to give such directions, as may put a stop to this Innovation and prevent its being drawn into precedent for the future, lest that which was graciously intended by His Majesty for a privilege and advantage to the good Inhabitants of that Colony, may be turned to their apparent danger and oppression.

END.











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